Supreme Court, U. S.
FILED
FEB 26 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

The Rule Bears a Rational Relationship to a Legitimate Government Interest

If the right to be educated is not "among the rights afforded explicit [or implicit] protection under our Federal Constitution," *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 35, then from what fundamental document do plaintiffs draw for explicit or implicit protection for the "right" to educate? *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593, instruct that no such "right" exists.

Petitioners are called upon once again to inform Respondents that the rule in question was not promulgated nor implemented to drive from the school system teachers and teacher aides who lack the proper character or morality to teach the children of this school district. Respondents set up this "straw person" and then bombard it with due process arguments. The office of the rule is to arrest and hopefully reverse the alarming rise in the illegitimate birth rate in the Drew School system. It is hard to conceive how anyone can quarrel with such as being a legitimate government interest.

It was the considered judgment of the superintendent and school district that a parent of a child born out of wedlock would add to the task of the school district rather than assist in achieving its goal.

Role modeling is not a new concept to this Court. As recently as January 30, 1976, certain provisions of the Federal Election Campaign Act of 1971 were held constitutionally justified although measured by the rigorous "compelling interest standard" because the primary purpose of such provisions was "to limit the actuality and *appearance* of corruption from large individual financial contributions. . . ." (Emphasis added) *Buckley* v. *Valeo*, No. 75-436, ... U.S. ....., p. 21. Continuing, the Court elucidated upon this role model concept by stating that "Congress was justified in concluding that the interest in safeguarding against the *appearance of impropriety* requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." (Emphasis added) p. 24. Again at page 27 of the opinion, the Court writes of the "appearance of corruption." At page 52 we find the language, "appearance of improper influence."

The Chief Justice had little difficulty in concurring in the finding of constitutionality of the disclosure provisions

of the Act even though they admittedly impinge on First Amendment rights because of the "legitimate public interest [in] the elimination of the *appearance* and reality of corrupting influences." (Emphasis added) p. 2.

Sounding a similar judicial note, Mr. Justice Marshall dissented from the majority in regard to the spending limitation placed upon a candidate's private funds. Although admitting that such limitation affects the candidate's exercise of his First Amendment rights, the Justice opined that the provision was constitutional since Congress had a compelling interest "in promoting the reality and *appearance* of equal access to the political arena." (Emphasis added) pp. 2, 3. The Justice was further concerned that even the "*perception* that personal wealth wins elections may . . . undermine public confidence in the integrity of the electoral process." (Emphasis added) p. 3. Mr. Justice Marshall stated it was of great moment that "candidacy for public office not become, or *appear to become*, the exclusive province of the wealthy. . . ." pp. 3-4.

Mr. Justice White, concurring in part and dissenting in part, agrees that Congress had a sufficient government interest in preventing not only actual undue influence that large contributors would have but also that which "the public might *think* they would have. . . ." (Emphasis added) p. 4. Further, the Justice wrote that it "is critical to obviate or dispel the *impression* that federal elections are purely and simply a function of money, . . ." (Emphasis added) p. 10. The Justice was even concerned that any "notion" that an election outcome was based primarily on money would do grave harm to the national interest. p. 11.

These pronouncements of concern for role models and appearances in the public arena are not of recent court vintage. Although they are woven from the basic fibers of this nation, they were never more eloquently stated than

in *CSC* v. *Letter Carriers*, 413 U.S. 548, 565, when the Court wrote:

> ". . . [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."

SEE: *Peters* v. *Kiff*, 407 U.S. 493.

If concern for reality and *appearances* has occupied the judicial thoughts of this Court for these many years, can it be gainsaid that concern for reality and *appearances* of school personnel is not only of rational interest to Petitioners, but is of compelling interest.

Promulgation and implementation of the rule in question are within the power of the School District and "cannot be condemned because it curtails the power of the individual to contract." *Alaska Packers Assn.* v. *Industrial Accident Commission of the State of California*, 294 U.S. 532, 543.

II.

The Rule Does Not Impermissibly Invade Any Constitutionally Protected Right of the Respondents

Respondents argue that they have a constitutionally protected right to bear illegitimate children and therefore, since this rule impinges upon that right, it is unconstitutional. This position misses the point. Assuming arguendo that such right exists, this Court is on record that no such rights are absolute. They can be impinged upon by a paramount interest of the government.

The right to procreate has never been declared to be absolute. The Court in *Buck* v. *Bell*, 274 U.S. 200 (1927) held constitutional a statute which provided for the sterilization of a feebleminded inmate of a state institution. The continuing vitality of this decision is attested to in *Roe* v. *Wade*, 410 U.S. 113, 154. Citing *Buck* v. *Bell*, supra, the Court wrote that it "has refused to recognize an unlimited right of this kind in the past." Such a right, if it exists, must give way to the paramount right of the School District.

More fundamentally, the plaintiffs misconceive the Drew regulation. They view it as a rule which limits births, whereas it only limits employment opportunities. It does not interfere with the *decision* to procreate but merely circumscribes some employment opportunities because of the consequences to school children.

Moreover, the vast opportunities for employment free of the Drew rule reveal the Drew rule is not one of social control. It is one conceived for valid educational purposes. Outside the context of role modeling in educational institutions there is ample play for individual rights to procreation.

Further, the Court has acknowledged that certain rights which are derivative from the right of privacy may be curtailed when the exercise of such rights leave the area of privacy and enter the public domain. *United States* v. *12 200-Ft. Reels*, 413 U.S. 123.

Mr. Justice Holmes, writing for the Court in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, opined:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other

than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." p. 355.

This Court is on record that the fact that a regulation forces an individual to make a choice even though the making of such choice may impinge upon a constitutional right, does not make the regulation itself unconstitutional. *Johnson* v. *Robinson*, 415 U.S. 361, and *Gillette* v. *United States*, 401 U.S. 437.

III.

Mere Statistical Data Cannot Satisfactorily Undermine the Constitutionality of the Rule

Respondents argue that the statistics in the record reflect that the rule comes down harder upon blacks and females than it does upon whites and males. Therefore, it is unconstitutional as a sex and/or racially discriminatory classification.

This position of respondents is at war with a clear body of law holding that an otherwise legitimate classification does not become unconstitutional simply because greater numbers of a racial minority or sex group is disadvantaged by the classification. *Jefferson* v. *Hackney*, 406 U.S. 535; *James* v. *Valtierra*, 402 U.S. 137; *Geduldig* v. *Aiello*, 417 U.S. 484.

Respondents further make the argument that the rule cannot be applied to males since it is too difficult to prove paternity. While acknowledging that there may be a greater burden in proving paternity of an illegitimate child, this in and of itself cannot affect the constitutionality of a regulation. The School District's legitimate prerogative to make classifications based on parenthood of illegitimate children is highlighted from language of the Court in *Gomez* v. *Perez*, ... U.S. ..... There, the Court struck down a Texas statute which allowed a natural father to escape support of his illegitimate children while fastening upon him a continuing duty to support his legitimate children. The Court avoided the speculative barriers of ascertaining paternity and held that illegitimate children could not be denied support from their natural parents. As the Court phrased it:

> "We recognize the lurking problems with respect to proof of paternity. These problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

IV.

The Rule Does Not Create a Sex-Based Classification

The rule in question operates against males as well as females.

This case is not controlled by *Frontiero* v. *Richardson*, 411 U.S. 677 or *Reed* v. *Reed*, 404 U.S. 71. In *Frontiero* the Court held that the government could not deny to female employees both substantive and procedural benefits granted males "solely . . . for administrative convenience." p. 690. In *Reed* the Court struck down a provision of the Idaho Probate Code because its purpose was merely to reduce the workload on probate courts by eliminating one class of contest. The Court struck down in *Stanley* v. *Illinois*, 405 U.S. 645, an Illinois statute which created a presumption that an unwed father of an illegitimate child was an unfit parent and denied such father a due process hearing to determine his fitness. The Court was of the opinion that the denial of such a hearing to the father "solely because

it is more convenient to presume than to prove" would not justify such a statute. The Court determined that Illinois' desire to save money by not providing such a due process hearing was insufficient to protect the statute from a constitutional attack. The Court emphasized that "the Constitution recognizes higher values than speed and efficiency." p. 656. In *Stanley* the Court explained its rationale for striking down a Texas statute in *Carrington* v. *Rash*, 380 U.S. 89, stating in Footnote 8 that *Carrington* teaches that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."

It is instructive to note the Court's upholding as constitutional preferential treatment of females in *Kahn* v. *Shevin*, 416 U.S. 351 and *Schlesinger* v. *Ballard*, ... U.S. ..... The Court allowed preferential treatment in these cases since the governmental entities concerned had legitimate interest in making such classifications.

V.

Respondents to Whom the Rule May Constitutionally Be Applied Cannot Challenge the Rule on the Ground That It May Conceivably Be Applied Unconstitutionally to Others, in Other Situations Not Before the Court

The courts below and the Respondents here attempt to gain mileage from the fact that the rule in question embraces certain categories of individuals described as innocent parties, e.g., childbirth incident to criminal rape. This the Respondents cannot do since they lack the proper vehicle. Neither of the Respondents fall in such a category. The record herein reflects that Respondents voluntarily engaged in the illicit conduct which brought them within the ambit of the rule.

Mr. Justice Brennan, writing for the Court in *United States* v. *Raines*, 362 U.S. 17, 20 and 21, stated:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—'the gravest and most delicate duty that this Court is called on to perform.' Marbury v Madison (US) 1 Cranch 137, 177-180, 2 L ed 60, 73, 74. [362 US 21] This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, N. Y. & P. S. S. Co. v Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. [Cited cases omitted]"

Acknowledging that this principle of constitutional adjudication has lost none of its vitality, Mr. Justice White

speaking for the Court, reaffirmed in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610, 611 that:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Cited cases omitted]."
>
> "A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See McGowan v. Maryland, 366 U.S. 420, 429-430, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 U.S. 37, 52, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:
>
> 'So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60 (1803)."

To the same sense of the Court is *Parker* v. *Levy*, 417 U.S. 733, 760, wherein Mr. Justice Rehnquist opined for the Court:

> "This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .' United States Civil Service Comm'n v. National Association of Letter Carriers, 413 U.S. 548, 580-581, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973)."

Petitioners acknowledge that this Court has recognized certain exceptions to this fundamental rule, but suggest that the rule in question in the case sub judice does not come within the ambit of any of the pronounced exceptions.

VI.

A Reform Measure Is Not Invalid Because It Does Not Address All Phases of a Problem

Respondents in their brief suggest that Petitioners had other methods and means to combat the critical problem of an alarming increase in the rate of illegitimate births among school children in the Drew community, e.g., "furnishing of contraceptive supplies and information." Brief of Respondents, p. 47. This Court as recently as January 30, 1976, rejected out of hand such a contention in *Buckley* v. *Valeo*, No. 75-436, ... U.S. ..... The Court held:

"The governing principle was stated in Katzenbach v. Morgan, 384 U.S. 641, 657 (1966):

> "'[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," Roschen v. Ward, 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," Semler v. Dental Examiners, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," Williamson v. Lee Optical Co., 348 U.S. 483, 489. [Cited footnote omitted.]'" Opinion, p. 99.

The fact that Petitioners have selected the method now in question as a means to accomplish a legitimate purpose can be of no concern to this Court merely because other methods are available which may or may not serve the same legitimate purpose. Further, Petitioners submit that the methods suggested by Respondents will not accomplish the same purpose.

CONCLUSION

Petitioners re-submit their position that the school district rule is neutral as to sex and race and does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment or any other mandates of the Constitution or laws of the United States. The Court should not strike down the policy, promulgated from necessity, in order that the school officials may not be in-

hibited in the carrying out of their appointed role to educate the youth of the local school district.

Respectfully submitted,

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